APPENDIX

SUPREME COURT OF FLORIDA

Wednesday, January 18, 1995

Case No. 84,526

In RE: ESTATE OF BERNARD L. DANESE, Deceased

District Court of Appeal,
1st District—No. 93-1039

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the court. See Fla. R. App. P. 9.330(d).

OVERTON, SHAW, KOGAN, HARDING and ANSTEAD, JJ., concur

A True Copy
TEST:

/s/ Sid J. White
SID J. WHITE
Clerk, Supreme Court

[SEAL]

DISTRICT COURT OF FLORIDA
FIRST DISTRICT

No. 93-1039

IN RE ESTATE OF BERNARD L. DANESE, Deceased,
Appellants.

July 29, 1994

Rehearing Denied Sept. 15, 1994

DAVIS, Judge.

Appellants, personal representatives of the estate of Bernard L. Danese and Doris B. Danese, appeal from an order granting appellees', Helene A. Steigman and Mary D. Edwin, petition for revocation of orders of discharge of personal representative in order to conduct further administration of the estate and denying appellants' motion for entry of order pursuant to the mandate of this court in *In re Estate of Danese,* 601 So.2d 570 (Fla. 1st DCA 1992). In denying appellants' motion for entry of order pursuant to mandate and in granting appellees' petition to reopen the estate, the probate court expressly relied on its interpretation of this court's decision in *Thames v. Jackson,* 598 So.2d 121 (Fla. 1st DCA 1992). Because the probate court erroneously applied the holding of *Thames* to the present case as its sole predicate for revoking the orders of discharge of the personal representative, we reverse.

In *Thames,* this court, in conformity with the holding of the United States Supreme Court in *Tulsa Professional Collection Serv., Inc. v. Pope,* 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), held that section 733.702, Florida Statutes (1985), which provides a time limit for the filing of claims against a decedent's estate, violated

due process and could not, standing alone, serve as a bar to the claims of known or reasonably ascertainable creditors.

Appellants assert that the probate court erred (1) in misconstruing this court's holding in *Thames* by finding that section 733.702 (1983) was unconstitutional as applied to the facts of the present case and; (2) in reopening the estate in view of appellants' failure to file a claim despite their actual knowledge of the opening of the estate at the time of its opening.

Publication of the first notice of administration of the estate of Bernard L. Danese began on November 19, 1984. On December 21, 1984, John Cattano, an attorney for appellees, filed a civil action against the estate of Bernard L. Danese. The civil action naming the estate was filed and served upon all parties interested in the estate within the three-month non-claim period. On May 15, 1985, appellees filed a notice of the civil action in the probate court. Appellees, however, failed to file a claim against the estate in the probate court within the three-month claims filing period provided by section 733.702, Florida Statutes (1983).

Prior to filing the civil action, Mr. Cattano wrote a letter to the estate's sole beneficiary, Doris D. Danese. Mr. Cattano's November 2, 1984, letter read as follows:

> Re: Distribution of Real Property in Estate—Bernard Danese.
>
> Dear Mrs. Danese: We represent Helene (McCall) Steigman regarding the distribution of your late husband's estate. Mrs. Steigman is particularly interested in the real property known as The Danese Homestead located in Mandarin. As I am sure you know, this property is the subject of various and questionable conveyances over the years. At this point, we are merely attempting to ascertain the potential distribution of this property from your hus-

> hand's estate so that the various Danese family members can be fully apprised.
>
> At present, we are under the impression that no estate or any file whatsoever has been opened in the Probate Court of Duval County, Florida. We would appreciate it greatly if you could please contact me regarding this matter, or give this letter to your attorney for an appropriate informational response. I will be looking forward to hearing from you in the very near future.

Upon receipt of Mr. Cattano's letter, Clay Tousey, Jr., counsel for Florida National Bank as personal representative of the estate, telephoned Mr. Cattano to discuss the letter and wrote a letter in response to Mr. Cattano's letter. Mr. Tousey's November 15, 1984, letter read as follows:

> Re: Estate of Bernard L. Danese.
>
> Dear John: We represent the Florida National Bank, as personal representative of the above estate. We have been forwarded your letter to Mrs. Danese, dated November 2, 1984, regarding the estate. We are unaware of any right that Mrs. Steigman may claim as beneficiary or otherwise.

The probate court entered an order closing the estate on January 23, 1986. The estate was reopened upon the discovery of additional estate assets on May 22, 1989 and closed again on September 21, 1989. On December 21, 1990, 15 months after the estate was closed, appellees filed a petition to reopen the estate based on the pending civil action. The probate court entered an order reopening the estate until disposition of the civil action. In reopening the estate, the probate court relied on this court's decision in *Steigman v. Danese*, 502 So.2d 463 (Fla. 1st DCA 1987), *rev. denied*, 511 So.2d 998 (Fla. 1987). In *Steigman*, this court had held that the civil complaint was filed and served upon all parties inter-

ested in the estate within the three-month statutory period and, therefore, for purposes of the time constraints of section 733.702, the complaint would amount to a timely filed claim. *Steigman,* 502 So.2d at 470.

The estate appealed the probate court's order granting appellees' petition to reopen the estate. While the appeal was pending, the Florida Supreme Court, in *Spohr v. Berryman,* 589 So.2d 225 (Fla.1991), disapproved this court's decision in *Steigman* to the extent that it was inconsistent with *Spohr.* In *Spohr,* the Florida Supreme Court held that the institution of a civil action does not constitute the filing of a claim under section 733.702. *Spohr,* 589 So.2d at 229. Thus, on the authority of *Spohr,* this court vacated the probate court's order reopening the estate and remanded the case to the probate court for reconsideration in light of *Spohr. In re Estate of Danese,* 601 So.2d 570, 571 (Fla. 1st DCA 1992).

On September 28, 1992, the estate filed a motion for entry of order pursuant to mandate requesting that the probate court apply *Spohr* and deny appellees' petition to reopen the estate. At the hearing on the estate's motion, appellees argued that *Spohr* did not require a denial of appellees' petition to reopen the estate because this court, in *Thames v. Jackson,* 598 So.2d 121 (Fla. 1st DCA 1992), held that section 733.702 was unconstitutional.

The probate court entered an order which granted appellees' petition to reopen the estate and denied the estate's motion for entry of order pursuant to mandate. The probate court found that, because *Thames* held that section 733.702 violated due process of law, section 733.702 was unconstitutional and could not operate as a bar to appellees' claim.

Appellants argue that the probate court misconstrued the holding of *Thames,* since section 733.702 is unconstitutional only when applied to known or reasonably ascertainable claimants. Appellants assert that appellees were conjectural or contingent claimants to which the

actual notice requirements of *Thames* do not apply. Appellants further argue that appellees' actual knowledge of the opening of the estate satisfied the due process notice requirement of *Thames*.

Appellees argue that they were known or reasonably ascertainable claimants and, therefore, the probate court properly applied the holding of *Thames* in granting their petition to reopen the estate. Appellees concede that they had actual knowledge of the opening of the estate, but argue that actual knowledge of the opening of the estate is insufficient to satisfy due process. What is required, they contend is actual notice.

Appellants rely on *In re Estate of Gleason,* 631 So.2d 321 (Fla. 4th DCA 1994), in support of their argument that the probate court erred in relying on *Thames* to reopen the estate. In *Gleason,* the probate court denied claimant's motion to reopen the estate of Jackie Gleason so that claimant could pursue a claim based upon ongoing six-year litigation against Gleason in the state of New York. Claimant sought to file his claim 14 months after the estate had been closed. Claimant argued that his failure to file a claim against the estate of Florida was no bar because he was a known creditor who was not given actual notice of the time in which to file claims and was thus deprived of due process under *Pope.* It was undisputed that the claimant was not given actual notice of the three-month period in which to file a claim.

The Fourth District in *Gleason* stressed that the United States Supreme Court reiterated in *Pope* what the Court had stated in *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), which was that "whether a particular method of notice is reasonable depends on the particular circumstances." *Id.* The court noted that it was not persuaded that the *Pope* court would have been sympathetic to a claimant who took no action until 14 months after the estate was closed. *Id.*

Similar to the decision in *Gleason,* we are not persuaded that the *Pope* court would have been sympathetic to appellees in the present case. Although appellees had actual knowledge of the opening of the estate at the time of its opening, appellees did not file a claim in the estate. Instead, appellees filed and served a civil complaint naming the estate within the three-month non-claim period. Moreover, appellees argued the applicability of *Thames* only after appellants filed a motion to enforce this court's mandate in *In re Estate of Danese,* 601 So.2d 570 (Fla. 1st DCA 1992).

We hold that the probate court erred in interpreting *Thames* to permit reopening of the estate and in denying appellants' motion for entry of order pursuant to mandate. Even if appellees were known or reasonably ascertainable claimants, appellees' failure to file a claim in the probate estate at any time before the estate was closed when they had actual knowledge of the opening of the estate makes *Thames* inapplicable to the present case.

In *Thames,* a creditor who claimed to have been well-known to the estate filed an untimely claim against the estate. After the estate objected to the claim and moved to strike the claim as untimely filed, the creditor moved for an extension of time to file a claim pursuant to Florida Probate Rule 5.495.[1] The creditor alleged that de-

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[1] Florida Probate Rule 5.495, effective January 1, 1989, and promulgated in response to the United States Supreme Court's decision in *Pope,* provided for an extension of time in which to file a claim for a creditor who was known to the personal representative, but was not served with a copy of the notice of administration. Rule 5.495 was repealed by the Florida Supreme Court, effective October 1, 1991, in view of an amendment to section 733.702 providing for the right to petition for an extension of time to file a claim. *In re Amendments to the Florida Probate Rules,* 584 So.2d 964, 970 (Fla.1991). Former Rule 5.495 provided:

> *Petition to extend time for filing claim.* If a creditor of the estate file a petition to extend the time for filing a claim,

spite his status as a known creditor, he was not provided a copy of the notice of administration of the estate or information regarding the estate. The probate court entered an order striking the creditor's claim and denied the creditor's petition for an extension of time to file a claim.

This court adopted the reasoning employed by the United States Supreme Court in *Pope* and held that section 733.702, Florida Statutes (1985), violated due process and could not, standing alone, operate to bar the claim of a known or reasonably ascertainable creditor. *Thames,* 598 So.2d at 125. The court recognized, however, that Rule 5.495 requires that a creditor establish the absence of actual knowledge in order to file a claim that would otherwise be barred under section 733.702. The court therefore reversed and remanded for an evidentiary hearing to determine whether, on the factual issues presented, the creditor had knowledge of the opening of the estate or whether his claim had been otherwise satisfied. *Id.*

Although the present case does not involve a petition for extension of time for filing a claim pursuant to Florida Probate Rule 5.495, the Florida Supreme Court, in enacting Rule 5.495, and this court in *Thames,* implicitly recognized that actual knowledge of the informa-

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after the time allowed by law for presenting claims, or a petition to require payment of claim, which claim was filed after the time allowed by law for presenting claims, and the petition alleges that the creditor was known to or reasonably ascertainable by the personal representative, but was not served with a copy of the notice of administration, such petition shall specifically allege facts showing that such creditor was known to or reasonably ascertainable by the personal representative. It shall also include a verified statement alleging either (i) the creditor did not have actual knowledge of those matters relating to creditors' claims required to be set forth in the notice of administration during the period allowed for filing claims against the estate, or (ii) facts sufficient to obtain relief under Florida Rule of Civil Procedure 1.540(b).

tion necessary to timely file a claim satisfies due process requirements. It is undisputed that appellees in the instant case had actual knowledge of the opening of the estate. Appellees, in fact, sued the estate, naming and serving the appropriate personal representative, within the three-month non-claim period prescribed by section 733.702, Florida Statutes. We, therefore, hold that the probate court erred in relying on *Thames* in denying appellants' motion for entry of order pursuant to mandate and in granting appellees' petition to reopen the estate.

Accordingly, we reverse and remand with instructions to the probate court to apply the decision of the Florida Supreme Court in *Spohr v. Berryman,* 589 So.2d 225 (Fla.1991) and deny appellees' petition to reopen the estate, based upon their failure to file a timely claim in the estate.

SMITH and JOANOS, JJ., concur.

DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

No. BJ-95

HELENE A. STEIGMAN, formerly known as HELENE D. MCCALL, and ELIZABETH D. DROZE,
Appellants,

v.

DORIS B. DANESE, FLORIDA NATIONAL BANK, as personal representative of the ESTATE OF BERNARD L. DANESE, JOHN B. DANESE, III, DOROTHY MATHIAS, and BARBARA DANESE,
Appellees.

Jan. 13, 1987

Rehearing Denied March 9, 1987

JOANOS, Judge.

Appellants Helene A. Steigman and Elizabeth B. Droze seek review of a summary final order which dismissed their fourth amended complaint with prejudice. Appellants contend the dismissal was improper if predicated on any of the following grounds: (1) the sufficiency of the allegations of the complaint, (2) the failure to comply with the provisions of sections 733.702 and 733.703, Florida Statutes, and (3) the statute of limitations or the doctrine of laches. We affirm in part and reverse in part.

Appellants' brother, Bernard L. Danese, died on February 18, 1984. On November 19, 1984, the first notice of administration of the Danese estate was published.

On December 21, 1984, appellants filed their initial complaint and notice of lis pendens. Shortly thereafter, appellants filed an amended complaint to include exhibits omitted from the original complaint due to clerical error. On January 17, 1985, a second amended complaint was filed to include Barbara Danese as a party.

The second amended complaint contained four counts: Count I was an action for cancellation of deeds, Count II was an action for resulting trusts, Count III was an action for constructive trusts, and Count IV was an action for damages. Each count was based on the allegation that in 1968 Bernard L. Danese wrongfully procured quitclaim deeds to real property from his sisters, appellants herein.

Defendants filed a motion to dismiss alleging the complaint failed to plead ultimate facts, the complaint was barred by the applicable statute of limitations and the doctrine of laches, and failure to comply with the Florida non-claim statute. Appellants filed a memorandum of law opposing the motion. After a hearing, the second amended complaint was dismissed and appellants were given fifteen days to file a third amended complaint. The order provided no reasons for dismissal:

A third amended complaint was filed, providing greater detail concerning the confidential and fiduciary relationship between Bernard L. Danese and his sisters. Upon motion to dismiss and a hearing thereon, the third amended complaint was dismissed. Appellants were allowed twenty days to file another complaint, but the order of dismissal was silent with regard to reasons therefor.

Appellants filed their fourth amended complaint. Again, appellees filed a motion to dismiss, and appellants filed memorandum of law opposing the motion. After a hearing, the trial court entered an order dismissing the fourth amended complaint with prejudice. Again the order was silent as to reasons for the dismissal.

Because of the silence of the trial court's order with respect to the grounds for dismissal, this court has been required to attempt to determine those grounds in order to effect meaningful appellate review. In addition, this omission has required counsel for both parties to argue each conceivable ground which may have been the basis for the dismissal with prejudice. While a trial court is not always required to state its reasoning in an order, it makes the appellate process more effective when it does.

Appellants' first argument is addressed to the sufficiency of the allegations of the complaint. A claim for relief "must state a cause of action and shall contain . . . a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." Fla.R. Civ.P. 1.110(b)(2); Trawick, Fla.Prac. and Proc. s. 6-5 (1985). Each element essential to recovery for the particular cause of action must be alleged. *Foley v. Hialeah Race Course, Inc.*, 53 So.2d 771 (Fla.1951). And while it is not sufficient to allege conclusions alone, "conclusions are not objectionable if they are supported by sufficient allegations of ultimate facts." Trawick, Fla.Prac. and Proc. s. 6-6 (1985). The purpose of a motion to dismiss is to test the legal sufficiency of the pleading. The motion admits all well pleaded allegations to which it is directed, and asserts that the pleading does not state a cause of action on the grounds specified. *Connolly v. Sebeco, Inc.*, 89 So.2d 482 (Fla.1956). If the motion is directed to the pleading as a whole and any count or alternative cause of action alleged is sufficient, then the motion should be denied. *Wilson v. Clark,* 414 So.2d 526 (Fla. 1st DCA 1982); Trawick, Fla.Prac. and Proc., s. 10-4 (1985).

Count I of the complaint in this case is an action for cancellation of a deed. *In Harrell v. Branson*, 344 So.2d 604 (Fla. 1st DCA), *cert. denied,* 353 So.2d 675 (Fla.

1977), this court held that entitlement to rescission or cancellation of a deed will lie when the deed has been obtained (1) through misrepresentation upon which the grantor relied, (2) inadequate consideration, and (3) an abuse of a confidential or fiduciary relationship. The court said "[i]t is not necessary that a direct statement be made to the representee in order to give rise to the right to rely upon the statement, for it is immaterial whether it passes through a direct or circuitous channel in reaching him, provided it be made with the intent that it shall reach him and be acted on by the injured party." 344 So.2d at 606.

The term "confidential relationship" encompasses "virtually all relationships of trust and dependence," and "courts have been especially quick to find a confidential relationship where . . . [as in the instant case] the grantor and grantee are related by blood and the grantor has become dependent on the grantee." *Thomas for Fennell v. Lampkin*, 470 So.2d 37, 39, f.n. 2 (Fla. 5th DCA 1985).

Thus, a presumption of undue influence will arise when the evidence establishes: (1) the existence of a confidential relationship between the grantor and the beneficiary, and (2) that the beneficiary actively procured the deed. *Jordan v. Noll*, 423 So.2d 368, 369 (Fla. 1st DCA 1982), *pet. for rev. denied*, 430 So.2d 451 (Fla. 1983). Once the presumption of undue influence arises, the beneficiary has "the burden of giving a reasonable explanation for the active role in the affairs of the grantor." 423 So.2d at 369. *See also Thomas for Fennell v. Lampkin*, 470 So.2d at 39, where the court said: "It is a well-established proposition in Florida that a deed may be set aside because of undue influence exercised on the grantor by the grantee." Accord *Adams v. Stringfellow*, 91 Fla. 305, 107 So. 633 (Fla.1926); *Pratt v. Carns*, 80 Fla. 243, 85 So. 681 (Fla.1920).

In the instant case, Count I of the complaint alleges: (1) a confidential relationship arising out of both the blood relationship between the grantors and their brother Bernard L. Danese, as well as their dependence upon him as the dominant family figure; (2) reliance upon the representations of their brother that the subject property would always belong to them and would be reconveyed to them at a later date, and (3) a lack of consideration. In addition, the complaint alleges specific incidences of the dominance and control exerted by Danese over his sisters. Another significant factor is the inference that the sisters would not have quitclaimed their respective interests in their deceased parents' property absent reasonable assurances that their interests would be protected.

For the most part, the conclusions expressed in Count I are supported by allegations of fact. However, there are no allegations of ultimate facts to support the allegation of paragraph 19 that the sisters "received no consideration for the purported conveyance" of their interests in the real property. Also, the recitals of the attached exhibits to the effect that consideration of $1.00 had been paid, could be viewed as inconsistent with the allegation of "no consideration." Despite this minimal suggestion of inconsistency, Count I alleges the requisite elements established by case law from this court and other district courts of appeal, which if proved, would entitle the sisters to rescission or cancellation of the quitclaim deed.

Count II of the complaint is an action for acknowledgement and establishment of resulting trusts. In *Wadlington v. Edwards,* 92 So.2d 629, 631 (Fla.1957), the court explained the nature of the implied trust termed "resulting trust" thusly:

> A resulting trust is simply a status that automatically arises by operation of law out of certain circumstances. . . . In the creation of a resulting trust it is essential that the parties actually intend to create

> the trust relationship but fail to execute documents or establish adequate evidence of intent. The typical illustration is where one man furnishes the money to buy a parcel of land in the name of another with both parties intending at the time that the legal title is held by the named grantee for the benefit of the unnamed beneficiary.

And in *Steinhardt v. Steinhardt,* 445 So.2d 352, 357-358 (Fla. 3d DCA); *pet. for rev. denied,* 456 So.2d 1181 (Fla.1984), the court stated that—

> A resulting trust . . . arises in three situations, (1) where an express trust fails in whole or in part, (2) where an express trust is fully performed without exhausting the trust estate, and (3) where a person furnishes money to purchase property in the name of another, with both parties intending at the time that the legal title be held by the named grantee for the benefit of the unnamed purchaser of the property.

See also Lowell and Grimsley, *Florida Law of Trusts,* s. 14-2 (3rd ed. 1984): "The inference raised from lack of consideration in a conveyance continues today as one of the several bases for declaring that a resulting trust exists."

Count II of the complaint incorporates the allegations of Count I, and further alleges that at the time of the "purported conveyances" Bernard L. Danese represented to his sisters that legal title would be held by the three brothers for the benefit of the sisters, and then reconveyed to them at a later time. This count also alleges, at paragraph 25, that Bernard Danese assured his sisters that he had the same understanding of the conveyances as did the sisters. Paragraph 26 alleges the sisters' intent "to create a trust relationship with their brothers regarding legal title of the subject real property," and paragraph 27 alleges Bernard Danese died on February

18, 1984, without arranging a reconveyance of the real property and without a will which would facilitate such reconveyances. This count, however, contains no recitations of ultimate fact to indicate that Bernard Danese intended to hold legal title to the real property for the benefit of his sisters. Thus, we conclude the allegations of Count II are insufficient to state a cause of action for resulting trust.

Count III of the complaint is an action for establishment of constructive trusts. A constructive trust is an implied trust having wide application, because based upon principles of fairness. Lowell and Grimsley, *Florida Law of Trusts,* s. 14-1 (3rd ed. 1984). The essential elements of a constructive trust are: (1) a confidential relationship, by which (2) one acquires an advantage which he should not, in equity and good conscience, retain. Lowell and Grimsley, citing *Quinn v. Phipps,* 93 Fla. 805, 113 So. 419 (1927). *See also Mayer v. Cianciolo,* 463 So.2d 1219, 1222 (Fla. 3rd DCA 1985), where the court held a constructive trust may arise even in the absence of fraud, where there is (1) a confidential relation, (2) a transaction induced by the relation, and (3) a breach of the confidence reposed. The court went on to state:

> Thus, where one person having legal and equitable title in property transfers it to another with whom he has a confidential relationship to hold for a particular purpose, a constructive trust arises in favor of the promisee which may be enforced where the promisor acts in a fashion so as to harm the beneficiary's interest. 463 So.2d at 1222.

In footnote 1 the court observed that "confidential relations" is a broad concept which "extends to every possible case in which a fiduciary relation exists as a fact, though it may be a moral, social, domestic, or merely personal relationship." (citations omitted).

In *Circle Finance Company v. Peacock*, 399 So.2d 81, 85 (Fla. 1st DCA), *pet. for rev. denied*, 411 So.2d 380 (Fla.1981); this court noted the vehicle of constructive trust "is particularly applicable in those situations where, although the property was not originally fraudulently acquired, it is against equity that the property should be retained by the person holding it." A constructive trust contains no element of agreement or intent to create a trust relationship. Rather, "[t]he trust is 'constructed' by equity to prevent an unjust enrichment of one person at the expense of another as the result of fraud, undue influence, abuse of confidence or mistake in the transaction that originates the problem." *Wadlington v. Edwards*, 92 So.2d at 631. *See also Steinhardt v. Steinhardt*, 445 So.2d at 356.

As does Count II, Count III of the complaint incorporates the allegations of Count I. In addition, Count III includes allegations that Bernard L. Danese obtained the conveyances through exertion of undue influence and abuse of the confidential relationship with his sisters. Also, this count alleges an antagonistic relationship ensued between Bernard Danese and his sisters which rendered Danese and his brothers trustees for the sisters' future benefit. Appellees maintain there is a fatal inconsistency in the counts of the complaint. Although the allegation concerning an antagonistic relationship could be construed as inconsistent with the allegations of a confidential relationship, we consider that, though inartfully phrased, this allegation is a permissible conclusion, because based on sufficient allegations of ultimate fact rather than on an inconsistency which would render the count a nullity.

Count IV of the complaint is an action for damages, which appears to be predicated on an allegation of constructive fraud. A cause of action for fraud must allege: (1) a representation by the defendant designed to prompt action by the plaintiff, (2) falsity of the representation

and the defendant's knowledge of the falsity, and (3) the plaintiff's reliance on the representation to his detriment. *Arnold v. Weck,* 388 So.2d 269, 270 (Fla. 4th DCA 1980), *pet. for rev. denied,* 399 So.2d 1140 (Fla. 1981). "Constructive fraud arises when a confidential or fiduciary relationship has been used to take advantage of the party seeking affirmative relief." Trawick, Fla. Prac. and Proc., s. 6-19 (1985). When fraud is relied upon, "the allegations relating thereto should be specific and the facts constituting the fraud clearly stated." *Kutner v. Kalish,* 173 So.2d 763, 764 (Fla. 3rd DCA), *cert. denied,* 183 So.2d 210 (Fla.1965). *See also* Fla.R.Civ. P. 1.120(b), which requires that the circumstances constituting fraud "shall be stated with such particularity as the circumstances may permit."

Count IV of the complaint incorporates the allegations of Count I, and further alleges misrepresentation, detrimental reliance, abuse of confidential relationship, unjust enrichment resulting from fraud, undue influence, abuse of confidence, and breach of fiduciary duty. In addition, Count IV alleges the sisters were not aware of the misrepresentation, fraud, and breach of fiduciary duty until after Bernard's death, at which point it became known that he had made no provision to secure or reconvey the sisters' interest in the real property.

The Count IV allegations are not models of specificity. Nevertheless, the factual account set forth in detail in Count I taken together with the allegation that the sisters did not realize, until Bernard's death, that he had made no provision to reconvey their interest in the real property, satisfies the requirement of Florida Rule of Civil Procedure 1.120(b), and sets forth the essential legal elements for constructive fraud.

In summary, we conclude that Count I states a cause of action for cancellation of deed, Count II lacks supporting factual allegations regarding the intent of Ber-

nard L. Danese to state a cause of action for "resulting trusts," Count III states a cause of action for constructive trust, and Count IV states a cause of action for constructive fraud.

Appellants' second argument is addressed to their purported failure to comply with the provisions of sections 733.702 and 733.703, Florida Statutes. Section 733.702 provides in relevant part:

> 733.702 Limitations on presentation of claims.—
>
> (1) No claim or demand against the decedent's estate that arose before the death of the decedent, including claims of the state and any of its subdivisions, whether due or not, direct or contingent, or liquidated or unliquidated; no claim for funeral or burial expenses; no claim for personal property in the possession of the personal representative; and no claim for damages, including, but not limited to, an action founded on fraud or other wrongful act or omission of the decedent, shall be binding on the estate, on the personal representative, or on any beneficiary unless presented:
>
> (a) Within 3 months from the time of the first publication of the notice of administration, . . .

Section 733.703 provides:

> 733.703 Form and manner of presenting claim.—A creditor shall file with the clerk a written statement of the claim, indicating its basis, the name and address of the creditor or his agent or attorney, and the amount claimed. The claim is presented when filed. If a claim is not yet due, the date when it will become due shall be stated. If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim is secured, the security shall be described. Failure to describe correctly the security, the nature of any uncertainty,

> or the due date of a claim not yet due does not invalidate the presentation made. A creditor shall deliver a copy of the claim to the clerk who shall serve the copy on the personal representative, in the manner provided for service of informal notice under s. 731.301(2)(a), and note the fact on the original.

In *Barnett Bank of Palm Beach County v. Estate of Read,* 493 So.2d 447 (Fla.1986), the supreme court held that section 733.702 is a statute of limitations. And, while recognizing the strong public policy favoring speedy settlement and closing of estates, the court also observed that—

> justice requires us to hold that *section 733.702 is a statute of limitations.* Valid grounds, such as estoppel or fraud, may exist that would and should excuse untimely claims. A creditor would lose the right to assert these potentially valid claims were we to hold that section 733.702 is a statute of nonclaim. Our holding that section 733.702 is a statute of limitations confirms the fact that estates and creditors must adhere to well-established practices when dealing with untimely claims. The estate must file a motion to strike or other objection to an untimely claim. If the creditor wishes to raise the issue of estoppel or fraud he may file a reply pursuant to Florida Rule of Civil Procedure 1.100. (citation omitted). This procedure guarantees that claims such as fraud and estoppel are properly adjudicated. 493 So.2d at 449. (emphasis supplied)

In *Notar v. State Farm Mutual Automobile Insurance Company,* 438 So.2d 531, 533 (Fla. 2d DCA 1983), the court held that Notar's motion for substitution of parties and appointment of personal representative could be considered a presentation of her claim. Similarly, in *Koschmeder v. Griffin,* 386 So.2d 625 (Fla. 4th DCA 1980), the inference arises that filing a civil action

within the statutory period prescribed by section 733.702 satisfied the filing requirements of section 733.703.[1]

As a collateral argument, appellants urge the "trust exception" is applicable with regard to Counts II and III. The rationale for the "trust exception" is that the subject property does not become a part of the estate because it was held in trust by the decedent at the time of his death. *Hodges v. Logan,* 82 So.2d 885 (Fla. 1955); *In Re Estate of Kulow,* 439 So.2d 280 (Fla. 2d DCA 1983); *In Re Estate of Peterson,* 433 So.2d 1358 (Fla. 4th DCA 1983); *Fisher v. Creamer,* 332 So.2d 50 (Fla. 3d DCA), *cert. dismissed,* 336 So.2d 600 (Fla.1976).

With regard to limitations applicable to actions for constructive and resulting trusts, the supreme court has held that (1) the limitations period will not begin to run against the rights of a beneficiary of a resulting or express trust until the trustee moves to set up an antagonistic interest, and (2) "the claims of a beneficiary of a constructive trust are subject to the application of the doctrine of laches which may be based on the provisions in statutes of limitations relating to actions at law of like character." The court went on to note that:

> This statement of the proposition recognizes that technically in the absence of a statutory provision, equity is not bound absolutely to apply a statute of limitations but in following the law, absent the presence of intervening equities to the contrary, a court

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[1] A recent case from this court addressed the adequacy of the notice provisions of the statute, but as a collateral matter the court implicitly found that individual claims filed against an estate and a wrongful death action filed against the administrator of an estate would be presentment within contemplation of the statute. *Coley v. Estate of Odom,* 500 So.2d 188 (Fla. 1st DCA 1986). (In *Coley* the respective claims were time barred because filed seventeen and eighteen months after expiration of the statutory period.) *Coley* is presently pending consideration by the Florida Supreme Court, Case No. 69,169.

> of equity will base its application of the doctrine of laches on the provisions of the appropriate statute of limitations.

Wadlington v. Edwards, 92 So.2d 629, 632 (Fla. 1957). *See also Fisher v. Creamer,* where the court said on petition for rehearing, "the failure to assert one's rights in circumstances where a relation of constructive trusteeship has arisen will not bar a suit if the action is brought as soon as the occasion arises for the assertion of his rights by the beneficiary." 332 So.2d at 52.

In this case, the first Notice of Administration was published on November 19, 1984, and this suit was filed December 21, 1984. Service of process was effected upon all parties interested in the estate within the 3-month statutory period. Thus, for purposes of the time constraints of sections 733.702, appellants' complaint was timely filed.

Appellants' final argument is directed to the applicability of the statute of limitations and the doctrine of laches as a possible ground for dismissal of the complaint. Appellants take the position that the 20-year limitation period set forth in section 95.231(2), Florida Statutes,[2] is applicable to Counts I, II, and III of the complaint. We cannot agree. Although the first three counts of the complaint relate to an interest in real property, we conclude that all four counts of the complaint are predicated primarily upon allegations of fraud. Therefore, the applicable limitations provisions are section 95.11(6), Florida Statutes, which states that—

> Laches shall bar any action unless it is commenced within the time provided for legal actions concern-

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[2] s. 95.231(2), Fla.Stat. (1983), provides:

> (2) After 20 years from the recording of a deed or the probate of a will purporting to convey real property, no person shall assert any claim to the property against the claimants under the deed or will or their successors in title.

> ing the same subject matter regardless of lack of knowledge by the person sought to be held liable that the person alleging liability would assert his rights and whether the person sought to be held liable is injured or prejudiced by the delay. This subsection shall not affect application of laches at an earlier time in accordance with law.

and section 95.11(3)(j), Florida Statutes, which provides that legal or equitable actions founded on fraud or deceit must be commenced within four years of discovery of the facts constituting the fraud. *See First Federal Savings & Loan Association of Wisconsin v. Dade Federal Savings & Loan Association*, 403 So.2d 1097 (Fla. 5th DCA 1981).

Although Counts I, II, and III are equitable actions for cancellation of deeds, and resulting and constructive trusts upon real property, the claims are founded upon misrepresentation and fraud. Thus, these counts, with Count IV, are controlled by the section 95.11(3)(j) 4-year limitations period. The period would not run, however, until discovery of the facts constituting fraud, which in this case allegedly occurred when Bernard Danese died. According to the allegations of the complaint, appellants did not become aware that their brother had made no provision to secure their rights to the subject real property until after his death.

We hold that dismissal of the complaint was proper with respect to the heirs of Francis T. Danese and John B. Danese, and affirm the order of dismissal in this regard. We reverse, however, with respect to the estate of Bernard L. Danese, because we find the allegations of Counts I, III, and IV of the fourth amended complaint sufficiently state a cause of action. We do not reach the question of the affirmative defenses which may be available, since the posture of this case does not bring that issue before us. We observe, however, that it is improper to raise affirmative defenses in a motion to dis-

miss, just as it is improper to anticipate the outcome with respect to a plaintiff's ability to prove the allegations of a complaint. This case should have proceeded through the filing of an answer with affirmative defenses, followed by a motion for summary judgment, rather than the time-consuming process of amended pleadings.

Therefore, the order of dismissal is affirmed with respect to the heirs of Francis and John Danese, reversed with respect to the estate of Bernard L. Danese, and the cause is remanded for proceedings consistent with this opinion.

THOMPSON and NIMMONS, JJ., concur.

DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

No. 91-2583

IN RE ESTATE OF BERNARD L. DANESE, Deceased

May 11, 1992

Rehearing Denied Aug. 12, 1992

KAHN, Judge.

The personal representatives of the estate of Bernard L. Danese and the decedent's spouse appeal an order of the circuit court, the effect of which was to reopen the estate in order to conduct further administration. Since 1984 the estate, through the personal representatives of the decedent, has been a party defendant in a civil claim pending in the circuit court. In *Steigman v. Danese*, 502 So.2d 463 (Fla 1st DCA 1987), *rev. denied*, 511 So.2d 998 (Fla.1987), this court ruled, inter alia, that a civil complaint naming the estate, filed and actually served upon all parties interested in the estate within three months of publication of the first notice of administration, was sufficient to satisfy the provisions of section 733.702, Florida Statutes. Unbeknownst to the successful appellants in that case, however, the probate court had entered an order closing the estate matter on January 23, 1986. The estate was briefly reopened for administration on May 22, 1989, and closed on September 21, 1989. In the order now under review, the lower court reopened the probate matter, finding that "further administration of the Estate is necessary until the disposition

of the tort action against the Personal Representative." After entry of the lower court order, and during the pendency of this appeal, the Florida Supreme Court decided *Spohr v. Berryman,* 589 So.2d 225 (Fla.1991), expressly disapproving this court's *Steigman* decision, and holding that filing of a civil lawsuit within the nonclaim period does not constitute compliance with section 733.702.

The *Spohr* decision would appear to apply to the civil action against the estate. This is necessarily true, since, during the pendency of the civil action, the supreme court has specifically disapproved our prior holding in *Steigman. See Maserati Automobiles, Inc. v. Caplan,* 551 So.2d 501 (Fla. 3d DCA 1989).

We vacate the order and remand to the lower court for reconsideration in light of *Spohr,* with due regard for the current status of the civil action, which, on the state of the record before us, remains pending against the estate.[1]

BOOTH and WOLF, JJ., concur.

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[1] We decline to address appellants' argument that the trial court incorrectly reappointed the two prior personal representatives without regard to their willingness to serve. We note that the reappointed personal representatives are not required to serve as personal representatives. *See* § 733.502, Fla.Stat. (1989).

IN THE CIRCUIT COURT
FOR DUVAL COUNTY, FLORIDA
PROBATE DIVISION

File Number: 84-1632-CP

Division: L

IN RE: ESTATE OF BERNARD L. DANESE, Deceased

ORDER GRANTING PETITION FOR REVOCATION OF ORDERS OF DISCHARGE OF PERSONAL REPRESENTATIVE IN ORDER TO CONDUCT FURTHER ADMINISTRATION OF THE ESTATE

THIS CAUSE came on for hearing as an adversary proceeding on a Petition for Revocation of Orders of Discharge of Personal Representative in Order to Conduct Further Administration of the Estate, filed on December 21, 1990, pursuant to § 733.903, Florida Statutes. Upon consideration thereof, the Court finds as follows:

The administration of this estate was first opened on November 15, 1984; closed on January 23, 1986; reopened upon the discovery of additional estate assets on May 22, 1989, and closed again on September 21, 1989.

A tort claim against the former Personal Representative, Florida National Bank was filed in the Fourth Judicial Circuit of Duval County, Florida, Case No. 84-15717-CA, during the initial phase of the administration of this Estate. Florida National Bank appeared in that action as Personal Representative of the Estate of Bernard L. Danese, and the bank has remained an active

party defendant in the action since it was filed. The action is pending.

A Petition for Discharge, as Personal Representative, was filed on December 13, 1985, by Florida National Bank, representing that the estate had been completely administered. However, an appeal was then pending on a dismissal of the tort case, and the attorneys representing the Personal Representative in the tort action were aware of the existence of that appeal as was the attorney representing the Personal Representative in the estate proceedings.

The petitioners herein and their attorneys were not given notice of the mentioned petition for discharge. Furthermore, the Court was not informed by the Personal Representative of the existence of the tort action and the fact it was pending on appeal.

Florida National Bank was then discharged by Order of Discharge entered herein on January 23, 1986.

When the estate was reopened in May, 1989, and during the further administration thereof, the Court was not made aware of the existence of the tort case.

The successor personal representative, Esther Baker, did not give petitioners herein, or their attorneys, notice of the further administration of the estate.

Petitioners, Steigman and Erwin, as parties in the tort case, consequently did not receive notice of the petitions for discharge filed by the respective personal representatives.

The Court was not informed of the existence of the tort case, which remains an incompleted aspect of the administration of the estate.

The further administration of the Estate is necessary until the disposition of the tort action against the Personal Representative. It is, therefore,

ORDERED that the Petition for Revocation of Orders of Discharge of Personal Representative in Order to Conduct Further Administration of the Estate be and the same is hereby granted and this estate is reopened for the purpose of completion of its administration. The Orders of Discharge dated January 23, 1986, and September 21, 1989 are hereby revoked and the Estate of Bernard L. Danese, Deceased, shall be reopened for further administration; it is further

ORDERED that Florida National Bank and Esther Baker are appointed Co-Personal Representatives of the Estate of the decedent and that upon taking the prescribed oath, filing designation of resident agent and Acceptance, Letters of Administration shall be issued without the requirement of bond.

ORDERED in Chambers in Jacksonville, Florida, this 23rd day of July, 1991.

/s/ Charles O. Mitchell
Circuit Judge

IN THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA
Probate Division

Case No.: 84-1632-CP

Division: L

IN RE: ESTATE OF BERNARD L. DANESE, Deceased

ORDER ON MANDATE OF
THE FIRST DISTRICT COURT OF APPEAL

THIS CAUSE came before the Court on the Motion for Entry of Order Pursuant to Mandate of the First District Court of Appeal. This Court previously granted the Petition for Revocation of Orders of Discharge of Personal Representative in Order to Conduct Further Administration of the Estate (the "Petition to Reopen"), filed by Petitioners in this adversary proceeding. Thereafter, the First District Court of Appeal vacated this Court's Order granting the Petition to Reopen and remanded for reconsideration. *In re Estate of Danese,* 601 So.2d 570 (Fla. 1st DCA 1992). Upon careful review of the mandate of *Danese* and First District's recent decision in *Thames v. Jackson,* 598 So.2d 121 (Fla. 1st DCA 1992), the Court finds that it must deny Petitioner's motion.

In *Thames,* the First District Court of Appeal held that the version of Florida Statutes, Section 733.702, applicable under the facts of the instant case violated due process of law. *Id.* at 125. The *Thames* holding was in conformity with the holding of the United States Supreme Court in *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478, 99 L.Ed.2d 565 (1988). Thus,

the version of Section 733.702, which Respondents assert as a bar to Petitioners' status as claimants in the estate is unconstitutional and "cannot, standing alone, operate as a bar to appellant's claim." *Thames,* 598 So.2d at 125.

This holding is entirely consistent with the mandate of the First District Court of Appeal in *Danese,* which directed the court to reconsider the case in light of *Spohr v. Berryman,* 589 So.2d 225 (Fla. 1991), with due regard for the current status of the civil action. Such a mandate returns the case to this Court in the same condition as though the order from which the appeal was taken had not been made and vests the Court with broad discretion in handling or directing the course of the cause thereafter. *Stossel v. Gulf Life Ins. Co. of Jacksonville,* 123 Fla. 227, 166 So. 821 (Fla. 1936); *Pritchett v. Brevard Naval Stores Co.,* 134 Fla. 649, 185 So. 134 (Fla. 1939). Thus, the Court is free to apply the holding of *Thames,* which explicitly declares the version of Section 733.702 relied upon by Respondents to be unconstitutional.

This holding is also consistent with the decision of the Florida Supreme Court in *Spohr* in that, even if the filing of a lawsuit is not a sufficient presentment of a claim under the non-claim statute, the failure to file a timely claim will not prevent assertion of that claim where an unconstitutional non-claim statute is relied upon as the only authority for barring the claim. *Thames,* 598 So.2d at 125.

Accordingly, this Court finds that it must deny the relief sought by Respondents in their Motion for Entry of Order Pursuant to Mandate of the First District Court of Appeal as a result of the First District's recent holding in *Thames v. Jackson,* 598 So.2d 121 (Fla. 1st DCA 1992). It is therefore

ORDERED:

1. Respondents' Motion for Entry of Order Pursuant to Mandate of the First District Court of Appeal is DENIED.

2. The Petition for Revocation of Orders of Discharge of Personal Representative in Order to Conduct Further Administration of the Estate filed herein by Petitioners is GRANTED.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 23rd day of March, 1993.

/s/ Charles O. Mitchell, Jr.
CHARLES O. MITCHELL
Circuit Court Judge

DISTRICT COURT OF APPEAL
FIRST DISTRICT
Tallahassee, Florida 32399
Telephone No. (904) 488-6151

September 15, 1994

CASE NO: 93-01039

L.T. Case No. 84-1632-CP

IN RE: ESTATE OF BERNARD L. DANESE, Deceased

BY ORDER OF THE COURT:

Appellee's motion for rehearing or, in the alternative, certification, filed August 12, 1994, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

/s/ Jon S. Wheeler
JON S. WHEELER
Clerk

By: /s/ Karen Roberts
Deputy Clerk

[SEAL]

CLAY B. TOUSEY, JR.
JAMES M. MCLEAN

MANDATE

FROM

DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

To the Honorable, the Judges of the Circuit Court
for Duval County

WHEREAS, in that certain cause filed in this Court styled:

Case No. 93-1039

Your Case No. 84-1632-CP

IN RE: ESTATE OF BERNARD L. DANESE.

The attached opinion was rendered on July 29, 1994,

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rules of this Court and the laws of the State of Florida.

WITNESS the Honorable E. Earle Zehmer, Chief Judge of the District Court of Appeal of Florida, First District and the Seal of said court at Tallahassee, the Capitol, on this 4th day of October, 1994.

[SEAL]

/s/ Karen Roberts
Deputy Clerk
District Court of Appeal
of Florida
First District